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No. 243.

Brief of Mynderse for Appellee

Supreme Court of the United States.

Filed Jan. 11, 1900.

No. 243.

THE UNITED STATES OF AMERICA,

Libellants and Appellants,

against

KLEINWORT SONS & CO., CLAIMANTS OF CARGO OF THE CARLOS F. ROSES,

Respondents.

Brief for Claimants.

WILHELMUS MYNDERSE,

Advocate.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *Appellants,* *against* KLEINWORT SONS & COMPANY, CLAIMANTS OF THE CARGO OF THE SPANISH BARK CARLOS F. ROSES.	October Term, 1899. No. 243.

BRIEF FOR CLAIMANTS AND RESPONDENTS.

This appeal runs from a decree of the District Court of the United States for the Southern District of Florida, bearing date February 8, 1899, decreeing that Kleinwort Sons & Company have, receive and recover the proceeds of the sale of the cargo of the bark *Carlos F. Roses*, after the payment of costs and expenses necessarily incurred in the care, custody, preservation and sale of such property (*Decree, pp.* 13, 14).

The libel was filed May 20, 1898, praying condemnation of the *Carlos F. Roses* and her cargo, as prize of war (*Libel, p.* 1), and on the same day process issued against the *Carlos F. Roses* and her cargo, then lying in the port of Key West, Florida, and both interests were duly seized by the marshal (*Monition and Return, pp.* 2, 3). Such process was returnable June 6.

The *Carlos F. Roses* was a Spanish bark of 499 tons, hailing from Barcelona, Spain, and carrying a crew of fourteen men, all Spaniards (*Dep. in Prep., Ans. to 4th and 5th Ints., p.* 7). She had been owned for many years by P. Roses Valenti, a citizen of Barcelona (*Dep. in Prep., Ans. to 9th Int., p.* 8). At the time of her capture she was on a voyage from Montevideo to Havana, Cuba, with a

cargo consisting of about 6,000 quintals (275,640 kilos) of jerked beef and about 19,800 bunches of garlic (*Dep. in Prep., Ans. to 7th and 8th Ints., p.* 8).

The capture was effected May 17 by the cruiser *New York*, when the bark, in pursuit of her voyage, was entering the Old Bahama Channel, off Punta de Maternillos, Cuba, about three hundred and twenty miles from her destination (*Libel, p.* 1; *Deps. in Prep., Ans. to 3d Int., p.* 7).

No defense was entered on behalf of the vessel, and a decree for her condemnation and sale was accordingly made June 2, four days before the return of process (*Decree, p.* 12).

A claim to the cargo, however, had been filed on May 31st, by Herman Greverus Kleinwort and Alexander Drake Kleinwort, composing the copartnership firm of Kleinwort Sons & Company, of London, England, together with a test affidavit (*Claim and Test Afft., pp.* 10, 11).

By the same decree which condemned the vessel time was allowed to the claimants of the cargo to present further proof of their ownership of the cargo (*Decree, p.* 12). Properly speaking, the decree granted an extension of time for original proofs, rather than an opportunity for "further proofs" in the technical sense of that term.

Under this authority for further proof three affidavits were presented in the District Court, all made by Charles Frederick Harcke, manager of Kleinwort Sons & Company, the claimants. These affidavits are dated respectively September 27, 1898; October 12, 1898, and October 31, 1898 (*Record, pp.* 17, 30, 35).

The original claim and test affidavit were made on behalf of Kleinwort Sons & Company by William H. Fain, claiming to be "specially authorized to act for and on behalf of" the same firm (*Record, pp.* 10, 11).

The general grounds upon which Messrs. Kleinwort Sons & Company rest their claim are set forth with substantial accuracy in the original test affidavit, to wit:

> "In the months of February and March, 1898, "the said bark *Carlos F. Roses*, being then in "Montevideo, bound on a voyage to Havana, Cuba, "took on board a cargo of jerked beef and strings

" of garlic shipped by Pla Gibernau & Company, of " Montevideo, to be transported to the said port of " Havana, there to be delivered to the order of the " shippers according to the conditions of certain " bills of lading issued therefor by the said bark to " the said Pla Gibernau & Company."

" Deponent further says, upon information and " belief, that the said shippers, Pla Gibernau & " Company, are merchants domiciled in, and citi- " zens of the Argentine Republic (Uruguay).

" Deponent further says that, being laden with " the cargo aforesaid, the said bark set sail from " Montevideo on the 16th day of March, 1898, " and proceeded upon her voyage to Havana until " the 17th of May, when she had reached a point " in the Bahama Channel off Martinique (Maternil- " los), at which time and place she was captured " by the United States cruiser *New York*, without " resistance on the part of the said bark, and there- " upon the said cruiser *New York* put on board the " said bark a prize master and crew, who brought " the said bark into this port of Key West, where " she and her cargo have been libeled as prize of " war.

" Deponent further says, upon information and " belief that upon and after the shipment of the " said cargo in Montevideo the claimants, copart- " ners as aforesaid, long prior to the capture of the " said bark and her cargo, made advances to the " shippers and owners of said cargo in the sum of " £6,297 British sterling, to wit, £2,714, item thereof, " upon the security of the said lot of 110,256 kilos " of jerked beef and 19,980 strings of garlic, " and £3,583, item thereof, upon the security " of the said lot of 165,384 kilos of jerked " beef; that at the time of making said advances " and in consideration of such advances, the " said bills of lading covering said shipments " were delivered to the claimants, duly endorsed " in blank with the intent and purpose that they " should thereby take the title to said bills of lading " and to the said shipments of jerked beef and gar- " lic, and should, upon arrival of the said vessel at " destination, take delivery of said shipments and " hold the same as security for their said advances " until paid, with full right to receive and possess " and dispose of the said shipments and to apply " the proceeds to the payment of their said ad- " vances; and accordingly the said Kleinwort Sons &

"Company did become and ever since have been "and still are as aforesaid the true and lawful own- "ers of the said bills of lading and of the shipments "of jerked beef and garlic therein referred to.

"Deponent further says that the said advances "so as aforesaid made by the claimants in the "amount of £6,297 British sterling were substan- "tially in the estimated value of the said ship- "ments and much in excess of their actual value "in this port, and that the said sum is equivalent "in money of the United States to about $30,- "633.35, and that no part of the same has been "paid or otherwise secured to be paid" (*Test Affi.*, *p.* 11).

In verifying the test affidavit the deponent added:

"This affidavit is made by him upon informa- "tion transmitted by cablegram, and it is neces- "sarily incomplete, and he prays leave, therefore, "to supplement the same hereafter as justice may "require" (*Test Affi.*, *p.* 11).

The three affidavits of Mr. Harcke served chiefly to produce and identify the documents of the case. He was the manager of the office of the claimants in London.

In his first affidavit, verified at the United States Consulate in London, September 27, 1898, he produces the original bill of exchange for £2,714/13/8, drawn by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited, and accepted by Kleinwort Sons & Company April 6, 1898 (*Exh. A*, *p.* 19; *Translation*, *p.* 38).

This bill of exchange was drawn upon the basis of 110,- 256 kilos of the jerked beef and the said 19,980 strings of garlic (*Harcke's Affi.*, *p.* 17).

On the day of the acceptance of the draft complete sets of the bills of lading covering such shipments, together with invoices of the complete cargo, were delivered to Kleinwort Sons & Company, in consideration of their acceptance of the bill of exchange, and as security for their liability thereunder (*Harcke's Affi.*, *pp.* 17, 18).

On April 9, Kleinwort Sons & Company sent the bills of lading and invoices by post to Messrs. N. Gelak

& Company, of Havana, bankers, who were the agents in that city of Kleinwort Sons & Company, who would either receive the cargo there on account of Kleinwort Sons & Company, or would, upon payment being made of the amount of Kleinwort Sons & Company's advances, deliver the bills of lading to Pedro Pages, or his order, for whom the goods were ultimately destined (*Harcke's Afft., p.* 18).

War began April 21, and interrupted mail communication with Havana, so that these documents did not reach Messrs. N. Gelak & Company in due course.

On June 17 a cablegram was sent to them by Kleinwort Sons & Company, requesting the return of the documents, and a reply came by cablegram that the documents had never been received (*Harcke's Afft., p.* 18; *Exh. G, p.* 22; *Translation, p.* 41).

Accordingly, Mr. Harcke annexed to his affidavit copies of the bills of lading, covering the said shipments of 110,256 kilos of jerked beef and 19,980 strings of garlic (*Exhs. H, I, J, K, L, M, N. O, P and Q, pp.* 23–27). These copies do not show the signature of the master, but their correctness as copies is certified to by the shippers.

He also produced copies of the invoices of the entire cargo (*Exhs. R and S, pp.* 28, 29), showing a shipment of 275,640 kilos of jerked beef, sixty per cent. (to wit, 165,384 kilos) being "*a la expedicion*" of the vessel, and forty per cent. (to wit, 110,256 kilos) being for account of Don Pedro Pages of Havana; and a shipment of 19,980 strings of garlic, one-half for account of Pedro Pages, and the other half for account of the shippers.

The original invoice was subsequently produced (*Exhs. Z and AA, pp.* 34, 35; *Translation, pp.* 40, 41).

At the same time Mr. Harcke produced the original bill of exchange for £3,583. drawn by the master of the bark to the order of Pla Gibernau & Company, and endorsed by them to the London and River Plate Bank, Limited, and accepted by Kleinwort Sons & Company, April 6, 1898 (*Ex. B, p.* 20; *Translation, p.* 38).

This bill of exchange was drawn upon the basis of the remaining portion of the shipment of jerked beef, to wit, 165,384 kilos, and in consideration of the acceptance of the

draft by Kleinwort Sons & Company, and as security for the liability so incurred by them, the entire set of bills of lading covering such shipments were delivered to them (*Harcke's Affi.*, *p.* 18). The exact date of such delivery does not appear, but they were delivered pursuant to an agreement for their production, and clearly before the payment of the draft (*Harcke's Affi.*, *p.* 18).

These original bills of lading were not sent out to Havana, although this portion of the cargo was likewise ultimately destined for the same Pedro Pages, the disturbed mail communication with that port having in the meantime become apparent; but they were retained by Kleinwort Sons & Company, and were annexed to Mr. Harcke's affidavit (*Exhs. C, D, E, F, pp.* 20-21; *Translation, pp.* 38, 39).

Mr. Harcke's affidavit shows that subsequently, and on May 9 both bills of exchange were paid by the claimants under their acceptance (*Harcke's Affi.*, *p.* 17), and that no payment whatever has been made to the claimants or to their agents on account thereof through advances from Pedro Pages or from any person on his behalf or otherwise; and that the claimants have been and are wholly unindemnified in respect of their payments, except by the proceeds of the cargo and the insurance thereon, which they have become entitled to collect (*Harcke's Affi.*, *p.* 18).

In Mr. Harcke's second affidavit, verified at the United States Consulate in London, October 12, 1898, he merely produced three of the original bills of lading for the shipment of 110,256 kilos of jerked beef and three of the original bills of lading for the 19,980 strings of garlic, the original invoice for the entire shipment of jerked beef and the original invoice for the shipment of garlic (*Exhs T, U, V, W, X, Y, Z, AA, pp.* 30-35; *Translation, pp.* 39-41).

He stated in his affidavit that the same had been received in London on October 6 from their Havana correspondents N. Gelak & Co., enclosed in a letter dated September 23, without information or explanation as to how or when the same came into the possession of Messrs. N. Gelak & Co.,

> " but they appear to have done so on or about the
> " 17th of September last, on which date they wrote
> " to Messrs. Kleinwort Sons & Company, informing
> " them that the said documents were in their hands "
> (*Harcke's Afft., p.* 30).

At that time some communication with Havana was opened, and the delayed mails of the previous April had apparently just reached there.

Mr. Harcke's third affidavit, verified before the United States Consul October 21, 1898, merely produced the remaining bills of lading for 110,256 kilos of jerked beef and the garlic (*Exhs. C. F. H* 1; *C. F. H* 1; *C. F. H* 3; *Translations, pp.* 39, 40). In this affidavit Mr. Harcke states that these documents were received from N. Gelak & Company under cover of a letter of October 4, and without information as to the manner in which the documents had come into their possession. He adds, however, that none of the documents had in any way been dealt with by Messrs. Kleinwort Sons & Company, except that the same had originally been forwarded by post to their correspondents, N. Gelak & Company (*Harcke's Afft., pp.* 35, 36).

Pending the hearing in the District Court the entire cargo was sold as perishable, and realized, it is asserted, about $12,000, less than one-half of the amount of the claimants' advances.

POINTS.

First.

THE PROOFS PUT FORWARD BY THE CLAIMANTS ARE REGULAR IN FORM AND WERE PROPERLY RECEIVED BY THE DISTRICT COURT.

It is to be observed that the proofs are not of the character technically known in the prize court as " further

proofs," but that they were intended to be and were, in fact, merely supplemental to the original test affidavit, and purely confirmatery thereof.

The original test affidavit was filed May 31, and the deponent thereto stated that the affidavit was made by him

> " upon information transmitted by cablegrams and
> " that it is necessarily incomplete, and he prays
> " leave therefore to supplement the same hereafter
> " as justice may require " (*Test Affi., p.* 11).

Upon the basis of this affidavit, the District Judge, by order entered June 2, *four days before the return of process*, directed that the claimants of the cargo should have sixty days in which to file further proofs of ownership (*Order, pp.* 9-12).

Evidently the proceedings on that day could not have been a trial in respect of the cargo, and were not intended to be. The time allowed by the Court was, by consent of counsel, and the order of the Court, duly extended to and including October 15, within which time Mr. Harcke's first affidavit was duly filed (*Orders, pp.* 12, 13).

The two subsequent affidavits were received by the Court after service upon the counsel for the United States (*see original affidavits on file*), and without objection on the part of the United States.

Thereafter, and on February 2, 1899, the United States, *for the first time*, moved for the condemnation of the cargo of the vessel, thereby treating the affidavits as an enlargement of the original test affidavit, and not as "further proofs" (*Motion. p.* 13).

Even if the affidavits of Mr. Harcke had been technical "further proofs" the rules regulating the presentation of such proofs rested entirely with the Court receiving them. Proof by way of affidavits in a court of original jurisdiction is usual and proper (*Upton's Maritime Warfare, pp.* 428-471).

The practice and rules of the Supreme Court as to the manner of taking further proofs in this Court are not

pertinent. They relate specifically and in terms to an entirely different situation.

Moreover the proofs of the District Court were received and read and considered by the Court upon the trial entirely without objection on the part of the United States or the captors.

After the decree of the District Court an appeal was taken by the United States, and errors were specifically assigned. But in no one of the assignments is there any intimation that proofs were irregularly taken, presented or received (*Assignments of Error, p.* 15).

The Court was properly satisfied with the proofs presented by the claimants, and did not direct any "further proofs" on their part. The technical situation of the trial was such that it would have been entirely proper for the District Judge at that stage to have called upon the claimants to produce further proofs and to have directed, in the discretion of the Court, that such proofs be taken under commission.

Second.

AT THE TIME OF CAPTURE THE CARGO WAS OWNED BY NEUTRALS AND WAS EXEMPT FROM CONDEMNATION, NOT BEING CONTRABAND OF WAR.

While this country has never adopted the Declaration of Paris of 1856, one provision of which protects neutral goods except contraband of war, even under the enemy's flag, the principle of that provision was put into operation during the late war by the second paragraph of President McKinley's proclamation of April 26, 1898, which provided:

> "Second: Neutral goods, not contraband of war,
> " are not liable to confiscation under enemy's flag "

Our Government did not take early action in the matter of defining contraband of war. In his proclamation of

April 26. President McKinley indicated that coal, beyond a vessel's necessary supplies, would be deemed contraband, and otherwise apparently determined to leave the question to the law of nations, or to our particular treaty with any interested nation.

In June, 1898, the Treasury Department issued this circular relative to contraband of war:

"CONTRABAND OF WAR.
"Circular No. 119.
"TREASURY DEPARTMENT, June 27th, 1898.

"*To Collectors of Customs and others:*

"The following is printed for the information of "owners, masters and agents of vessels visiting "your office and others interested in shipping:

"The President, by his proclamation of April 26, "1898, declared 'the neutral flag covers the enemy's "'goods with the exception of contraband of "'war.'

"The term contraband of war comprehends only "articles having a belligerent destination, as to an "enemy's port or fleet.

"With this explanation the following articles are "for the present to be treated as contraband:

"Absolutely contraband (long list of military and "naval supplies, such as arms, ammunition, armor "plate, salt peter, &c.).

"Conditionally contraband, coal when destined "for naval stations, a port of call or a ship or "ships of the enemy; materials for the construc-"tion of railways or telegraph, and money, when "such materials or money are destined for the "enemy's forces; provisions when destined for an "enemy's ship or ships, or for a place that is be-"sieged."

"O. L. SPAULDING,
"*Acting Secretary.*

There was a blockade of the port of Havana, but Havana was at no time during the war a besieged city.

"A *siege* is a *military* investment of a place, so "as to intercept, or render dangerous, all com-"munication between the occupants and persons "outside of the besieging army; and the place is "said to be *blockaded*, when such communication, "*by water*, is either entirely cut off or rendered

"dangerous by the presence of the blockading "squadron. A place may be both besieged and "blockaded at the same time, or its communica- "tions by water may be intercepted, while those "by land may be left open, and *vice versa*. Both "are instituted by the rights of war and for the "purpose of injuring the enemy, and both impose "upon neutrals the duty of not interfering with the "operations of the belligerents. But there is an "important distinction with respect to neutral "commerce, between a maritime blockade and a "military siege. The object of a blockade is solely "to distress the enemy, intercepting his commerce "with neutral States. It does not, generally, look "to the surrender or reduction of the blockaded "port, nor does it necessarily imply the commission "of hostilities against the inhabitants of the place. "The object of a military siege is, on the other "hand, to reduce the place by capitulation, or "otherwise, into the possession of the besiegers. "It is by the direct application of force, that this "object is sought to be attained, and it is only by "forcible resistance that it can be defeated. Hence, "every besieged place is, for the time, a military "post; for even when it is not defended by a "military garrison, its inhabitants are converted "into soldiers by the necessities of self-defence. "This distinction is not merely nominal, but, as "will be shown hereafter, leads to important con- "sequences in determining the rights of neutral "commerce, and in deciding questions of cap- "ture."

Halleck's International Law, 3d Edition, Vol. II., pp. 174, 186.

Spain, in her proclamation of April 23, defined contraband goods as follows:

"Cannon, quick firing guns, shells, rifles, all pat- "terns of cutting and thrusting weapons, and arms "of precision, bullets, bombs, grenades, fulminates, "capsules, fuses, powder, sulphur, dynamite, and "explosives of all kinds as well as uniforms, straps, "pack saddles, and equipment for artillery and cav- "alry, marine engines, and in general all appliances "used in war."

As published in New York papers, April 25, 1898.

Arms, ammunition, military or naval equipment are essential contraband. Goods destined for peaceful or purely domestic uses are essentially not contraband. Other goods not inherently contraband may be declared contraband when destined especially for the support of the war or as sustenance of the enemy's armies.

Provisions, as a rule, are not regarded as contraband; though there have been instances where, with a view of cutting off the supplies of a beleagured country, provisions, especially those of a manufactured character, have been specifically proclaimed contraband; but usually with the limitation that they thereby become subject to pre-emption by the capturing nation, and not to confiscation. There being circumstances under which provisions might be of peculiar value to a besieged enemy, a belligerent may deem it essential to cut off supplies of such provisions, whether the same are destined for civil or military use. Neutrals naturally object to an arbitrary and perhaps whimsical regulation affecting the product of their countries, and to meet such objections, and at the same time to subserve the military purposes of the belligerent the goods have been declared subject, not to confiscation, but to pre-emption.

Indeed the subject is not infrequently regulated by public treaties, and certain of such treaties entered into by the United States effectually designate the status of Kleinwort Sons & Co.'s goods and the rights of their neutral owners.

The claimants are British subjects, and our treaty with Great Britain provides:

> "In order to regulate what is in future to be "esteemed contraband of war, it is agreed that "under the said denomination shall be comprised "all arms and implements serving for the pur-"poses of war, by land or sea, such as cannon, "muskets, mortars, petards, bombs, grenades, car-"casses, saucisses, carriages for cannon, musket-"rests, bandoliers, gun-powder, match, salt petre, "ball, pikes, swords, head pieces, cuirasses, hal-"berts, lances, javelins, horse-furniture, holsters, "belts, and generally all other implements of war, "as also timber for ship-building, tar or rozin, cop-"per in sheets, sails, hemp and cordage, and gen-

" erally whatever may serve directly to the equip-
" ment of vessels, unwrought iron and fir planks
" only excepted; and all the above articles are
" hereby declared to be just objects of confiscation
" whenever they are attempted to be carried to an
" enemy.

" And whereas the difficulty of agreeing on the
' precise cases in which alone provisions and other
" articles not generally contraband may be regarded
" as such, renders it expedient to provide against
" the inconveniences and misunderstandings which
" might thence arise; It is further agreed that
" whenever any such articles so becoming contra-
" band, according to the existing law of nations,
" shall for that reason be seized, the same shall not
" be confiscated, but the owners thereof shall be
" speedily and completely identified; and the cap-
" tors, or, in their default, the Government under
" whose authority they act, shall pay to the mas-
" ters or owners of such vessels the full value of all
" such articles, with a reasonable mercantile profit
" thereon, together with the freight, and also the
" demurrage incident to such detention."

Treaty of 1794, *Art. XVIII.; Treaties and Conventions, pp.* 389, 390.

Our treaty with Spain defined contraband fully as explicitly:

" Under this name of contraband or prohibited
" goods, shall be comprehended arms, great guns,
" bombs with the fuses, and other things belong-
" ing to them, cannon-ball, gun-powder, match,
" pikes, swords, lances, spears, halberds, mortars,
" petards, grenades, saltpetre, muskets, musket-
" balls, bucklers, helmets, breast-plates, coats of
" mail, and the like kind of arms proper for arming
" soldiers, musket-rests, belts, horses with their
" furniture, and all other warlike instruments
" whatever. These merchandizes which follow
" shall *not* be reckoned among contraband or pro-
" hibited goods; that is to say, all sorts of cloths,
" and all other manufactures woven of any wool,
" flax, silk, cotton, or any other materials what-
" ever; all kinds of wearing apparel, together with
" all species whereof they are used to be made; gold
" and silver, as well coined as uncoined, tin, iron
" latton, copper, brass, coals, as also wheat,

"barley, oats, and any other kind of corn and "pulse; tobacco, and likewise all manner of "spices, salted and smoked flesh, salted fish, cheese "and butter, beer, oils, wines, sugars, and all sorts "of salts, and *in general all provisions which* "*serve for the sustenance of life.*"

Treaty of 1795, *Sec. XVI.; Treaties and Conventions, p.* 1011.

We find no treaty between this country and Uruguay defining contraband.

The captured cargo was the produce of a neutral country, Uruguay, destined, so far as the jerked beef was concerned, for the ordinary food supplies of the plantation negroes of Cuba, and unfit for other use.

Third.

THE TITLE TO THE GOODS AND THE RIGHT TO POSSESSION OF THEM AT THE TIME OF CAPTURE WAS IN NEUTRALS.

The principles of ordinary jurisprudence are as applicable in determining title to goods captured in time of war as in defining in the civil courts the rights of contesting claimants in times of peace.

Thus, goods shipped in open war to become the property of an enemy consignee on arrival, without any intermediate act to be done by or on behalf of the shippers, which he could exercise to prevent delivery, are deemed, while afloat, the property of the consignee. Such are goods which are shipped under bills of lading defining the consignee specifically and by name.

It is a rule of the civil courts.

The Thames, 14 *Wallace*, 99, 108.

And it is likewise the rule of the prize courts.

The Josephine, 4 *C. Rob.*, 25.

A qualification to the general rule is, perhaps, found in the doctrine that a transfer in open war, by an enemy, of goods in transit is void as against captors.

The Francis, 8 *Cranch*, 354.

But a transfer made by an enemy prior to the outbreak of hostilities in respect of goods in transit, is valid.

The Vrow Margaretha, 1 *C. Rob.*, 336.
The Anna Green, 1 *Gallison*, *p.* 274.
Halleck's International Law, *3d Ed.*, *Vol. II.*, *p.* 91.
Hall's International Law, *p.* 526.
Wheaton's International Law, *p.* 485.

And even in open or flagrant war, transfers of title by neutrals or by subjects are valid. The rules of prize courts are intended merely to protect captors against frauds upon their rights.

There is no possible object in restraining transfers where the goods are equally exempt from capture before and after the transfer.

Wherever the principles of transfer in transit have been stated by writers the restrictions are impressed only in respect of transfers from enemies in time of war.

> "Transfers during war, made with fraudulent in-
> "tent by a belligerent to a neutral, need not be
> "recognized by the other belligerent."
>
> *Glenn's International Law*, 238.

It will be observed that all the bills of lading issued by the master of the *Carlos F. Roses* in respect of his cargo, recited that the shipments were made by Pla Gibernau & Company, and that they were to be delivered in Havana, "to order" (*Exhs. C, D, E, F, T, U, V, W, X, Y; C F H 1, C F H 2, C F H 3*; *Translations*, *pp.* 38, 39), and that, moreover, each bill of lading bore the endorsement in blank of Pla Gibernau & Company.

The possession of bills of lading, thus drawn and endorsed, when acquired for value and in the absence of fraud, gives to the possessor the title to the property.

A cargo afloat is incapable of manual delivery, and

title passes by the delivery of a symbol, the bill of lading, with any usual indicia of ownership in the way of indorsement. This principle, long established in custom, received judicial sanction in Liebkanow *vs.* Mason (5 *T. R.*, 683), and has been uniformly followed since.

Dows vs. *Greene*, 24 *N. Y.*, 638.
Anderson vs. *Clark*, 2 *Bing.*, 20.
Mills Co. vs. *East & West India Docks*, 6 *Q., B. D.*, 480.
Barber vs. *Meyerstein*, 4 *House of Lords*, 325, 335.

The foregoing cases establish that the vesting of title does not depend upon whether the transfer of documents is made pursuant to an unqualified sale, or pursuant to advances by the transferee. The right of the transferee in the latter case to dispose of the goods is established in Ogg *vs.* Shuter (*Law Rep.*, 1 *C. P. D.*, 47).

The only cases in which the vesting of legal title in the transferee for advances has been doubted are those in which it has been sought to hold him personally liable for freight; and in certain of such cases it has been decided, after much conflict between the highest authorities, that the transferee is without such liability.

Sewell vs. *Burdick*, *L. R.*, 10 *App. Cas.*, 74.
First Nat'l Bank vs. *Kelley*, 57 *N. Y.*, 34.

Whatever may have been the relations between Valenti, the owner of the vessel, and Pedro Pages, to whom it was proposed that the entire cargo should be ultimately delivered, we need not inquire. It is only clear that such relations do not concern the present case. Evidently Pla Gibernau & Company were the sellers of the goods, and concerned only in receiving the agreed price as soon as possible; and, apparently, Valenti and Pages were purchasing the goods to be paid for practically on delivery in Havana, Valenti perhaps taking a larger share of the expected profits in consideration of the use of his vessel. To facilitate the transaction the ordinary intervention of bankers was secured. Such intervention was made; but with the reservation of all such securities as bankers ordinarily require.

Now, although the invoices indicated that in respect of the jerked beef sixty per cent. was for account of the vessel and forty per cent. for account of Pedro Pages, and in respect of the garlic fifty per cent. was for account of Pedro Pages, and the remaining fifty per cent. for account of Pla Gibernau & Company, who, to this small extent, joined in the venture, every one of the bills of lading provided that the goods should be delivered at Havana, to the order of Pla Gibernau & Co.

Pla Gibernau & Co. were neutral merchants of Uruquay and were careful to retain absolute control of the shipments until they had their money in hand.

The invoice price of the jerked beef was $27,497.24, and of the garlic $3,218.75 (*Exhs. Z and AA; Translations, pp.* 40, 41). The aggregate of the two was $30,716.99.

To provide for payment two bills of exchange were drawn upon Kleinwort Sons & Co., one for £2,714/13/8 by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited; the other for £3,583/11/6, by the master of the *Carlos F. Roses*, to the order of Pla Gibernau & Co., and endorsed by them as follows:

> "Pay the London & River Plate Bank, Limited,
> "or order, Pla Gibernau & Co."

Then, in regular course, these drafts and the endorsed bills of lading came into the lawful possession of the London and River Plate Bank, Limited, on or about March 15th.

They, in accordance with ordinary business usage, advanced to Pla Gibernau & Co. the whole or the greater part of the money specified in the drafts.

In turn, they forwarded the drafts and bills of lading to their London house, and presented the drafts to Kleinwort & Co. for acceptance, on April 6.

The bills of lading of half the cargo were at the same time handed over, and the remaining bills of lading upon arrival and certainly before the capture of the vessel (*Harcke's Afft., p.* 18).

On April 9 Kleinwort Sons & Company forwarded to their own agents in Havana, N. Gelak & Company, such bills of lading as they then had in hand, to be delivered

to Pedro Pages upon payment of their advances (*Harcke's Afft., p.* 18).

These bills of lading were never taken up by Pedro Pages, and apparently were delayed in arriving in Havana by the breaking out of the war, so that they did not reach the hands of N. Gelak & Co. until September 23, 1898 (*Harcke's Afft., p.* 30).

The bills of lading covering the other portion of the cargo were never forwarded by Kleinwort Sons & Co. to Havana. Quite possibly, and we are willing to assume, they were held in London awaiting instructions from Valenti, who might prefer to take them up there.

It may be, however, that they did not reach Kleinwort Sons & Co.'s hands until after April 21, through delays in the mails from Uruguay. But delivery of the bills of lading to Kleinwort Sons & Co. was assured at the time they gave their acceptance to the drafts on April 6 appears from the fact that they gave their acceptance solely in consideration of the delivery of the bills of lading, as security for the liability incurred by them (*Harcke's Afft., p.* 18).

Undue importance is attached by the counsel for the Government and the captors to the circumstance that upon the face of one draft the drawers instructed Kleinwort Sons & Co. to charge the amount of the draft to the account of Pedro Pages, and that upon the face of the other draft the drawers instructed Kleinwort Sons & Co. to charge the amount of the draft to the account of P. Roses Valenti.

Assuming that Valenti and Pages were Spaniards, as we believe them to be, these instructions would be important if Kleinwort Sons & Co. had followed them and had not held the shipping documents, and had looked solely to the credit of Pedro Pages and P. Roses Valenti for reimbursement. But as it was, and as is almost universally the case, in similar transactions, the directions were purely formal and in the way of convenient identification. The *credit* was given to *the goods* and the title to the goods, and possession and control of them, was absolutely secured by the bankers.

So far from there having been a transfer of the property from an enemy to a neutral during a period of open war, it is apparent that from first to last an enemy never for one moment held title to an atom of the cargo. Up to the time of shipment the entire cargo was owned by Pla Gibernau & Co. They transferred it to the London and River Plate Bank, Limited. They in turn transferred it to Kleinwort Sons & Company, and Kleinwort Sons & Company held it through to the end.

It may be admitted that all these transfers were made between neutrals for the purpose of facilitating a sale ultimately to a Spaniard at a Spanish port. But the contemplated sale was arranged in times of peace; and even if it had been arranged in time of war it would not, in the absence of a purpose to break a blockade, affect the title to the goods so long as such title was held by a neutral.

The purpose of capturing goods is to weaken the resources of the enemy by taking those things which add to their wealth and their strength. It would in nowise disastrously affect Pedro Pages or Valenti to have goods captured which did not belong to them, and which could never belong to them until they should pay full value for them.

It is the right of neutrals to trade with the enemy in goods that are not contraband of war, and their rights are respected by belligerents, and their goods are protected to the full extent of their interest in them. The goods are confiscated only to the extent that the enemy have acquired a pecuniary interest in them.

Fourth.

WHATEVER REFINEMENTS MAY BE DRAWN AS TO THE NATURE OF THE CLAIMANTS' TITLE IN THE GOODS, IT IS CERTAIN THAT THEY HELD CONTROL OF THE SHIPMENTS.

Such control conferred upon them either an absolute legal title or a *jus in re*, either one of which leads to a release of the goods.

The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Co. under endorsements which gave to them, and to them alone, the right of demanding delivery from the vessel.

Anderson v. *Clark*, 3 *Bing.*, 20.

Fifth.

LIENS FOR ADVANCES, WHEN ACCOMPANIED BY POSSESSION OR CONTROL OF THE PROPERTY AGAINST WHICH ADVANCES ARE MADE, ARE RECOGNIZED BY THE PRIZE COURTS.

In the War of 1812 a shipment of goods, part of the cargo of the *San Joze Indiano*, was claimed by one Lizaur, a neutral, residing in Rio de Janeiro. The shipment had been made by Dyson Bros. & Co., of Liverpool, and was consigned to Dyson Bros. & Finney, of Rio de Janeiro. The two houses of Dyson Bros. & Co., of Liverpool, and Dyson Bros. & Finney, of Rio, consisted of the same persons. The proofs indicated that Lizaur had sent hides out to the Liverpool house of Dyson Bros. & Co. for sale, with instructions to them to make shipments back to him. The proceeds of the hides had not been realized at the time of shipment of the captured goods. Moreover, Lizaur's orders far exceeded the expected amount of such proceeds. Dyson Bros. & Co. were apparently unwilling to give credit to Lizaur, and, therefore, in making the captured shipments on his order, forwarded the bills of lading and invoices to their own house of Dyson Bros. & Finney, writing:

> "For Mr. Lizaur we open an account in our "books here and debit him, etc. We cannot yet "ascertain the proceeds of hides, etc., but find his "order for goods will far exceed the amount of "these shipments; therefore, we consign the whole "to you that you may come to a proper under-"standing with him."

That is, Dyson Bros. & Co. retained absolute control of the goods which had been ordered by Lizaur until "a proper understanding" as to the payment of the goods had been reached.

The invoice which was thus forwarded to Dyson Bros. & Finney was headed "Consigned to Messrs. Dyson Bros. " & Finney by order and for account of J. Lizaur."

After the capture Lizaur filed a claim to the goods, but it was held that no interest in the goods had as yet passed to him, even though Dyson Bros. & Co. had in their hands the proceeds of his hides.

The San Joze Indiano, 1 *Wheat.*, 208.

It is to be assumed that upon analagous facts the Court would be just as ready to vest title to captured goods in a friend as in an enemy.

In May, 1861, the *Amy Warwick* sailed from Rio with a cargo of coffee destined to Hampton Roads for orders. By her charter-party she was to go either to Richmond, New York, Philadelphia or Baltimore. She was captured August 10 and taken into the District of Massachusetts for condemnation. The claims of Dunlop, Moncure & Co., of Richmond, and of Edmund Davenport & Co., of Richmond, to certain portions of the cargo were rejected; and the vessel herself was condemned. A claim put forward by J. L. Phipps & Co. in respect of advances upon cargo was sustained. The claimants were all British subjects and constituted the commercial houses of J. L. Phipps & Co., of New York; Phipps Bros. & Co., of Rio, and Phipps & Co., of Liverpool. Dunlop, Moncure & Co. had chartered the vessel and sent her to Rio with a cargo consigned to Phipps Bros. & Co. for sale. With the proceeds of this cargo, adding £2,000 of their own money, Phipps Bros. & Co. gave to the brig the cargo of coffee which was subsequently captured. The bill of lading recited that they were the shippers, and that it was to be delivered to their order. They endorsed the bills of lading over to their firm of J. L. Phipps & Co., of New York. J. L. Phipps & Co., of New York, upon receiving the bills of lading, endorsed and delivered them to Charles M. Fry & Co., of New

York, agents for Dunlop, Moncure & Co., under an agreement that from the proceeds of the coffee there should first be paid to J. L. Phipps & Co. the £2,000 advanced by their Rio firm in purchasing the cargo. The bills of lading were delivered actually to the agents of the enemy, and with no protection to the shippers except their agreement to pay the advance out of the proceeds of the sale. The claim, however, of J. L. Phipps & Co. was sustained by the District Court and was affirmed on appeal in the Circuit Court and in this Court.

The Amy Warwick, 2 *Sprague*, 150; 2 *Black*, 635.

The bark *Winifred* was captured in May, 1861, off Cape Henry, and confiscation of vessel and cargo was demanded as being enemy's property. The cargo, consisting of 4,200 bags of coffee, had been purchased by Phipps & Co. in Rio, as agents for Crenshaw & Co., Richmond merchants. The funds in their hands for the purchase being insufficient, they defrayed three-eighths of the cost of the purchase. The consignment formally was to shippers' order, but the bills of lading were sent forward endorsed to Crenshaw & Co. Subsequently Phipps & Co. made further advances of $20,622.26 on April 26, while the goods were in transit, and *after* the outbreak of hostilities, taking a reassignment of the bills of lading. The District Court ordered the restoration of three-eighths of the cargo to Phipps & Co., but the remaining five-eighths was condemned.

The Winifred, Blatchford's Prize Cases, 33.

The decree of the District Court was affirmed by the Circuit Court, except as to the five-eighths portion of the cargo condemned below. As to that, the Circuit Court allowed further proofs, and on those that Court, December 3, 1863, allowed Phipps & Co. the amount of their advances with interest.

The Winifred, Blatchford's Prize Cases, p. 35, *note.*

The *Lynchburg* was captured with her cargo in May, 1861, at the mouth of the Chesapeake Bay. 2,045 bags

of coffee, part of her cargo, had been purchased by Maxwell, Wright & Co., as agents for Wortham & Co., of Richmond. Maxwell, Wright & Co. took bills of lading, consigning the cargo to their own order, and drew against them on Brown, Shipley & Co., of London, for £6,090, who accepted the drafts and subsequently paid them. The entire cargo was destined for enemies ultimately. Wortham & Co. claimed 504 of the bags of this shipment subject to the lien of Brown, Shipley & Co. The District Court restored to Brown, Shipley & Co. 1,541 bags by consent of the prosecuting attorney, but condemned the 504 bags claimed by Wortham & Co.

The Lynchburg, Blatchford's Prize Cases, 51.

Upon appeal taken by Brown, Shipley & Co. the Circuit Court ordered further proofs in respect of the 504 bags, and these were ultimately restored to Brown, Shipley & Co.

The Lynchburg, supra, 52, *note*.

The case of *Sally Magee*, cited by counsel for the captors, is clearly to be distinguished from the foregoing cases, as might be expected from the fact that it was decided in the trial court by the same Judge.

In the foregoing cases the liens for advances were respected and sustained. In the case of the *Sally Magee* it was adjudicated upon the facts that there was no lien. Coleman & Company, who claimed the lien, appear to have been creditors of the enemy, owners of the goods; and *after capture* of the goods were designated by the owners to receive the goods in place of Davenport & Company, who had previously been designated as consignees. At that time, too, after the capture of the goods, letters were given by the owners of the goods to Coleman & Co. authorizing them to sell the cargo, and from the proceeds pay their account.

The cargo was condemned by the District Court.

Sally Magee, Blatchf. Prize Cas., 382.

The decree of condemnation was affirmed in this Court.

Sally Magee, 3 *Wallace*, 451.

The case of the *Mary and Susan*, also relied upon by the counsel for the captors, does not seem to be in point.

American merchants, G. & H. Van Wagenen, had ordered a shipment of certain goods from Cross & Co. Cross & Co. caused the goods to be shipped, the consignment being made by bills of lading explicitly in favor of G. & H. Van Wagenen. The invoice of the goods showed that they had been bought by Cross & Co. "by order and "for account and risk of G. & H. Van Wagenen," but an entry was made thereon signed by Cross & Co.

> "The goods are now the property of Messrs.
> "Spooner, Atwood & Co., bankers, of Birmingham,
> "to whom you will please remit the amount of
> "this invoice.

The Court held that when the goods went on board the vessel under a bill of lading consigning them directly to G. & H. Van Wagenen they became the property of G. & H. Van Wagenen, and, therefore, ordered the restitution of the goods.

The whole claim of the captors in that case was that inasmuch as Spooner, Atwood & Co. could not have authorized G. & H. Van Wagenen to take the goods, the original order for purchase being given, not to them, but to Cross & Co.; therefore, the title had never passed to G. & H. Van Wagenen.

This line of reasoning was not sustained by the Court, and it is difficult to see in what way the case affords any support to the captors' contentions here.

Sixth.

THE ENTIRE CARGO IS COVERED BY THE CLAIMS OF KLEINWORT SONS & COMPANY.

The counsel for the Government intimate that a portion of the garlic was not invoiced to either Valenti or to Pedro

Pages, but was apparently invoiced to Pla Gibernau & Co., who have not filed any claim thereto.

It is quite true that the invoice shows that Pla Gibernau & Co. retained an interest in one-half of the garlic, as shown by the invoice (*Exhibit AA.; Translation, p.* 41).

The invoices have nothing to do with the title to the goods, nor do they affect in any way the control of the goods. Both the title and control of the goods are through the *bills of lading*, and the *bills of lading* cover *all* the beef and *all* the garlic (*Bills of Lading; Translations, pp.* 38–40).

In each case the bills of lading recited "Shipment by "Pla Gibernau & Co. for account and risk of whom it "may concern," and then went on to provide in each instance that the goods should be delivered "to order." The parties concerned were the parties to whom the bills of lading were endorsed and delivered.

Kleinwort Sons & Co. in lawfully possessing themselves of all the bills of lading of all the cargo became entitled to the entire cargo.

Seventh.

THE FACT THAT THE CLAIMANTS HAVE BEEN OR WILL BE INDEMNIFIED BY THE COLLECTION OF INSURANCE IS IMMATERIAL.

In his affidavit of September 27 Mr. Harcke states:

> "The said cargo was ultimately destined for Don "Pedro Pages, of Havana, who, in the ordinary "course of business, would, by payment to or in- "demnification of Kleinwort Sons & Company, or "their agents in that behalf, take up the said bills of "lading and thus be enabled thereon to take the "goods. No payment whatever has been made to "Messrs. Kleinwort Sons & Company, or their "agents, on account of the payments made by them "through the said advances by said Don Pedro

"Pages, or by any other person on his behalf or "otherwise; and the said Kleinwort Sons & Com- "pany have been and are wholly unindemnified in "respect of their said payments, except so far as "the proceeds of the said cargo and the insurance "thereon, which, as the owners of the said goods, "they have become entitled to collect, thereby sub- "rogating to their own rights, to the extent of said "payments, the insurers of the said goods."

Harcke's Affi., p. 18.

The counsel for the Government and the counsel for the captors unite in asserting special rights to the captors to this cargo, because it seems to have been insured, and insured, as they suspect, against "risks of war."

It is probably the exception when cargo goes to sea uninsured; and no adjudication is found in which the circumstance that the owner has, by special contract of insurance, shifted his loss upon other shoulders, has been held to operate to the advantage of the captors.

Not only is substantially every shipment of goods which goes upon the ocean insured, but every such shipment of goods is insured against the risks of war.

The ordinary policy of marine insurance recites that the insurers are "contented to bear the perils and adventures "of the seas, men of-war, fires, enemies, piracy, rovers, "thieves, jettisons, &c., &c."

Often insurers insert in their policies warranties on the part of the assured to avoid blockaded ports and other similar conditions. Moreover, upon policies issued in time of war, insurers may impose additional premiums upon voyages in waters which invite danger; but the ordinary standard marine policy of insurance is against the risks of war.

If the insurers have paid this loss or are bound to pay this loss to Kleinwort Sons & Co. they will be subrogated to the claimants' rights; but that subrogation comes to them only, because they have paid for it dollar for dollar. In fact they will have paid fully two dollars for one if the recovery is limited to the proceeds of the cargo.

Their equities appear to be higher than those of the captors.

Eighth.

THE CLAIMS OF KLEINWORT SONS & COMPANY SHOULD BE SUSTAINED TO THE FULL AMOUNT ALLEGED IN THEIR TEST AFFIDAVIT, TO WIT, $30,644.35, WITH INTEREST.

The goods have been sold as perishable, and have, it is asserted, realized less than half that amount.

Under the treaty of 1794 with Great Britain the captors, or in their default the Government, should pay the full original value of the cargo, with a reasonable mercantile profit, at least to the extent of Keinwort Sons & Co.'s advances.

Provision therefor should be made in the mandate in case it appears, as we apprehend, that the proceeds will not otherwise suffice.

WILHELMUS MYNDERSE,
Advocate.

No. 243.

Office Supreme Court U. S.
FILED
MAR 15 1900
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

UNITED STATES,
Appellant,

AGAINST

KLEINWORT SONS & COMPANY, claimants of the cargo of the CARLOS F. ROSES.

October Term, 1899.
No. 243.

The cases of the *Hampton*, 5 Wallace, 372, and the *Battle*, 6 Wallace, 498, now cited by the Attorney-General, appear to have been cases of condemnation for violation of blockade. The arguments of the Court are based upon that theory.

In the case at bar, Kleinwort Sons & Company claim not merely a lien to the cargo, but the title to the cargo.

The cargo was shipped by neutrals, under advances by neutrals, and was pledged to neutrals.

It was the right of neutrals to trade with Cuban ports without violating blockade, and goods cannot be condemned upon the ground of enemy ownership until the title has actually and absolutely passed to the enemy.

WILHELMUS MYNDERSE,
Advocate.